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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, JOHN F. COPPES, individually and as Director of the Indiana Employment Security Division; VAN SMITH, MAX WRIGHT, and ALBERT SUMMERS, individually and as members of the Indiana Employment Security Board, KENNETH M. SWAIN, individually and as Manager of the Fort Wayne Branch of the Indiana Employment Security Division,

Appellants,

vs.

ESSIE D. BURNEY,

Appellee

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

JURISDICTIONAL STATEMENT

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Appellants,

vs.

ESSIE D. BURNEY,

Appellee

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

JURISDICTIONAL STATEMENT

Appellants (hereafter referred to as the Division) appeal from the Decree and Injunction of the United States District Court for the Northern District of Indiana, sitting as a three-judge court under 28 U.S.C. §§ 2281 and 2284, granting a permanent injunction restraining the Division from terminating, withholding, suspending or reducing the unemployment compensation benefits of any recipient, who has once been determined to be eligible, without a prior due process hearing. Appeal is also taken from the Order

of the District Court denying the Division's subsequent motion to amend that Decree and Injunction.

OPINION BELOW

The Memorandum of Decision, including the Decree and Injunction of the District Court, and the Order of the District Court denying appellants' Motion to Amend have not been reported. They are set out herein in Appendix A.

JURISDICTION

One Ronald M. Hiatt filed suit as a class action against the Indiana Employment Security Division seeking a declatory judgment that a provision of the Indiana Employment Security Act be held unconstitutional and seeking injunctive relief against its enforcement. His complaint recited the grounds of jurisdiction to be 42 U.S.C. § 1983, 42 U.S.C. § 501 et seq., and 28 U.S.C. 2201 and 2202. Appellee Essie B. Burney intervened as plaintiff in that suit, reciting the same jurisdictional basis.

The District Court entered its Memorandum of Decision on October 27, 1971. The Division filed a motion to amend the Decree and Injunction, pursuant to Federal Rules of Civil Procedure, Rules 59(e), 60(b)6, and 65(d), on November 8, 1971, which motion was denied by the District Court on November 29, 1971. The Notice of Appeal was filed on January 3, 1972. That notice is set out in Appendix A.

The basis of the jurisdiction of this Court over this appeal is 28 U.S.C. § 1253, as sustained by the case of *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U. S. 73 (1960).

The Indiana statute involved is Indiana Code of 1971, 22-4-17-2, also found in Ind. Ann. Stat. § 52-1542a (Burns 1964 Repl.). The text of this statute is set out in Appendix B.

QUESTIONS PRESENTED ON APPEAL

1. Whether an unemployed person receiving benefits under the Indiana Employment Security Act, after having been determined to be an insured worker and having been found eligible for benefits for certain weeks, may be determined to be ineligible for benefits for later weeks by reasons of failure to meet eligibility standards during periods after the initial determination, without a "prior due process hearing."

2. If it be determined that such a hearing is required, whether the type of hearing required is a full, adversary, evidentiary hearing or an informal hearing process by which all interested parties are informed of the issues and the alleged facts upon which a determination of ineligibility would be made and are allowed to present such information and explanation as they see fit, but without the formal requisites of a trial-type hearing.

STATEMENT OF THE CASE

On or about January 7, 1971, Appellee Essie B. Burney was determined to be eligible for unemployment compensation benefits as a result of the termination of her previous employment. She received benefits of forty dollars per week until March 26, 1971, at which time her benefits were suspended. During a regularly scheduled interview on March 24, 1971, she informed the Division's claims deputy that she was available only for first shift work. For that reason she was ruled not to have been available for work for the week ending March 27, 1971, and for future weeks until such time as she should enter the labor market and become available for all shifts of work.

On April 27, 1971, Mrs. Burney filed a Motion to Intervene as Plaintiff and Complaint of Intervening Plaintiff in an action previously filed as a class action against the

Division. That action, heard by a three-judge court, had sought to declare invalid the Indiana statutory provision that a recipient found to be eligible by the Division would have his benefits suspended upon an appeal by the employer of that determination. That original issue was decided on the authority of this Court's decision in *California Department of Human Resources Development v. Java*, 402 U. S. 121 (1971), issued while this action was pending in the District Court, and is not an issue on this appeal.

On May 7, 1971, the District Court granted Mrs. Burney a temporary restraining order requiring the division to reinstate her benefit rights and not again suspend or terminate them "without a prior, due process hearing."

Mrs. Burney was granted a hearing before an appeals referee on July 1, 1971, and on July 13, 1971, the referee affirmed the ruling that Mrs. Burney was ineligible. Mrs. Burney then appealed the referee decision to the Review Board of the Division, which on December 6, 1971, after the judgment of the District Court, reversed the referee decision.

On September 21, 1971, Mrs. Burney moved for summary judgment, which motion was granted and judgment entered on October 27, 1971. (See appendix A).

The Division filed on November 8, 1971, a motion to amend the injunction to specify that the type of hearing required be the California determination procedure approved by this Court in *Java*.* A memorandum in opposition to the motion was filed, arguing that a formal, adversary, evidentiary hearing be required. On November 29,

* This Motion, timely filed under Federal Rules of Civil Procedure, Rule 59(e), suspended the time for appeal so that the Notice of Appeal, although filed more than sixty days after the filing of the Memorandum of Decision, was still timely to preserve the right to appeal therefrom. 6A *Moore's Federal Practice*, § 59.12(2) and cases there cited.

the District Court entered an order denying the Division's Motion. (See Appendix A). Notice of Appeal was filed on January 3, 1972. (See Appendix A).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I

An Administrative Determination As To The Eligibility of a Claimant For Benefits Is Permissible.

The District Court in this case declared invalid, as contrary to the Social Security Act, certain provisions of Indiana law which set out the procedures used by the Division to determine the eligibility of claimants for unemployment compensation benefits. That statute, Indiana Code of 1971, 22-4-17-2, is set out in Appendix B.

Under the statute, a person who is unemployed makes an initial claim for benefits, at which time his status as an insured worker is determined. At such time, also, an initial determination of eligibility is made by a claims deputy. The claimant must register for benefits on a weekly schedule thereafter.

The factors determining eligibility may be divided for the present purpose of analysis into two groups. The first deals with the circumstances surrounding the termination of the employment, such as whether the claimant was terminated because of a lack of available work or because of misconduct or whether the termination was voluntary on the part of the claimant. That determination is ordinarily made on the initial claim and not redetermined at that level. Either the claimant or employer, if dissatisfied with the determination, may appeal it to a referee for a full evidentiary hearing.

The other group of issues deal with the claimant's activities during the period of unemployment and must be

redetermined weekly. The greatest number of disputes in regard to these issues arise from the requirements of Indiana Code of 1971, 22-4-14-3, which states in relevant part:

> "An unemployed individual shall be eligible to receive benefits with respect to any week only if he is physically and mentally able to work, is available for work and is found by the Division to be making an effort to secure work."

Other issues to be determined weekly include also the basic question of continued unemployment. The statute provides, in 22-4-17-2(d) (See Appendix B) that the deputy shall determine each week the validity of the claim filed by the claimant for that specific week. A finding of ineligibility for a certain week may, depending on the grounds for the ineligibility, affect only the claim for that specific week or may involve a suspension or revocation of benefit rights for a specific future period.

This Court, in *Java,* supra, dealt with an issue of payment of benefits when an employer appealed a deputy determination favorable to the claimant on the issue of cause of termination of employment. The provision there invalidated provided for automatic suspension, pending that appeal, of all benefits which the claimant had been ruled by the deputy to be eligible for. That provision was held to be in conflict with 42 U.S.C. § 503(a)(1) which requires that provision be made "to insure full payment of unemployment compensation when due."

The District Court relied on *Java* to hold that § 503(a)(1) invalidates the Indiana procedure in the situation of Mrs. Burney's intervening complaint as well as in the original action, which raised the precise *Java* issue. It is here submitted that the decision of the District Court was

error because *Java* is inapplicable to the situation of Mrs. Burney's case.

The specific language of the District Court is as follows:

> "Even though defendants review on a weekly basis the eligibility of a claimant, the court finds that the concept of when benefits are "due" under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of ineligibility. The court thus finds that plaintiff Burney's benefits were "due" and could not be summarily suspended due to a deputy's determination of ineligibility under § 52-1542a(d) [I.C. 22-4-17-2]".

This statement is clearly erroneous as a description of the purpose and provisions of the Indiana Act. Whether or not the "concept" of a claimant's application (whatever that might be) changes from week to week, the claimant's conduct during the period of unemployment might change. The Indiana Act requires that the claimant hold himself available for work and be actively seeking work each week as a condition for eligibility for unemployment compensation benefits for that week. This determination can only be made during the period of unemployment. Thus the District Court erred in treating an initial determination, at least so far as it would apply to issues such as availability and effort to seek work as opposed to the termination issue, as having a continuing force to control or in any way affect later determinations for any other week. It bears repeating at this point that the issue in Mrs. Burney's case was her availability for work.

Neither is the District Court's holding correct as a statement of the purpose of the unemployment compensation provisions of the Social Security Act. As stated in *Java*:

> "Further, providing for 'security during the period following unemployment' was thought to be a means of assisting a worker to find substantially equivalent employment. The Federal Relief Administrator testified that the act 'covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job.' " 402 U. S. 121 at 130. (footnotes omitted).

It is only a logical corrolary that, if the act is intended to free people to look for jobs, a state may enact provisions requiring that they actually use a portion of their time for that purpose.

II

Even Were A Hearing Required, No Formal, Evidentiary, Adversary Hearing Would Be Called For.

The District Court at no time specified what type of hearing was required, making its injunction so vague that the resulting uncertainty of the injunction constitutes reversible error. *Gunn v. University Committee*, 399 U. S. 383 at 388-389 (1970). The Division filed a motion requesting clarification of the requirements intended to be set, but the District Court was either unwilling or unable to do so, denying the motion. Thus, even were the Division not entitled to a plenary hearing by this Court on the issue discussed in Section I hereof, there is an alternate ground for relief here stated.

The language used by the District Court was the requirement of a "prior, due process hearing." Due process, though, does not set up a single, unchanging standard of procedure, but requires a separate determination, as to each type of situation in which the due process requirement

is invoked. *Goldberg v. Kelly,* 397 U. S. 254 (1970); *FCC v. WJR,* 337 U. S. 265 (1949). As stated in the *WJR* case:

> "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. • • • The requirements imposed by that guarantee are not technical, nor is any particular form of procedure necessary." 337 U. S. at 275.

While this brief argument already presented should be sufficient to demonstrate a substantial question of law and that the District Court committed reversible error, some further discussion should help to clarify the issues here involved.

The purported basis of the decision below was the *Java* decision of this Court. That opinion does not use the phrase "prior, due process hearing." The phrase is found, though, in *Goldberg v. Kelly, supra,* which was argued by Mrs. Burney as an alternative basis of decision.

The Division's motion urged that a *Java* type procedure be imposed in this case. That is, the deputy would gather information from all interested parties and from any other available source, notify the parties of the issue to be determined and the information gained from his investigation, and offer opportunity for rebuttal or explanation. No formal "trial" would be held. The deputy would then make his determination on the basis of that information and rebuttal. The Memorandum in Opposition set out a detailed scheme, generally based on *Goldberg,* requiring an evidentiary, adversary procedure as formal as any court trial. An examination of the application of *Java* and *Goldberg* to this situation will demonstrate the practical issues involved.

It was pointed out in Section I, supra, that the determination involved is an *initial* determination of eligibility for

that week and particularly on the issue which was involved in Mrs. Burney's case. Such a determination, under the Indiana procedure, must be made each week for every claim for unemployment compensation benefits filed. Thus the procedure used must, while being full enough to reach a meaningful and rational decision, be summary enough that the whole system does not fall into complete chaos. Provision is made in the Indiana procedure for a full, formal hearing with all the niceties argued by Mrs. Burney to be necessary at a post-termination hearing, as called for by the Social Security Act. 42 U.S.C. § 503(a)(3).

The determination process examined by the Court in *Goldberg* was an extraordinary proceeding in the welfare procedures there involved. The benefit payments there considered, the AFDC program, did not call for frequent periodic redeterminations of eligibility as a prerequisite for receiving benefits. The AFDC program does not require the recipients to carry out any specified activities on a regular basis.

The requirements for continued eligibility differ because the programs were designed to meet different needs, those of the AFDC program being long-term needs and those of unemployment compensation primarily short-term needs. Thus the refusal of the District Court to clarify its injunction, in light of the demand by Mrs. Burney for certain procedures, places the Division on the horns of the dilemma of risking a contempt citation by not following those standards which it knows were presented to the District Court and which therefore might be adopted by the District Court as what it had intended from the beginning, or on the other hand, causing chaos and the complete breakdown of the entire operation by attempting to meet impossible standards.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set the case for plenary consideration.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

RONALD M. HIATT, ET AL.,
Plaintiffs,
v.
INDIANA EMPLOYMENT SECURITY DIVISION, ET AL.,
Defendants.
Civil No. 70 F 122

MEMORANDUM OF DECISION AND ORDER

This case is now before the court upon a motion for summary judgment filed on July 25, 1971 by plaintiff Ronald M. Hiatt on behalf of himself and a subclass consisting of all present and future unemployed workers who have registered for employment referral with the Indiana Employment Security Division and have been determined to be eligible for unemployment payments therefrom, and whose benefits have been or will be terminated, suspended, withheld, or reduced solely because of the provisions of IND. ANN. STAT. § 52-1542a(e) (Burns 1970 Supp.). The court will also consider the supplemental motion for summary judgment filed September 22, 1971, which seeks summary judgment not only for the plaintiff but also for the intervening plaintiff Burney. The original motion for summary judgment as supplemented by the motion of September 22, 1971 will be considered together in this memorandum of decision. Both plaintiff Hiatt and intervening plaintiff Burney seek summary judgment on their requests for injunctive and declaratory relief as set forth in Hiatt's amended complaint and Burney's intervening complaint. Defendants, the Indiana Employment Security Division

and the director and members thereof and the manager of the Fort Wayne Branch of the Indiana Employment Security Division, have filed no response to the motion for summary judgment. The court will grant plaintiffs' motion for summary judgment in accordance with the provisions of this order.

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983, and jurisdiction is founded upon 28 U.S.C. § 1343. On November 2, 1970, a three-judge United States District Court was convened to hear and determine the action pursuant to 28 U.S.C. § 2284. This is a class action challenging on constitutional and statutory grounds certain provisions of IND. ANN. STAT. § 52-1542a (Burns 1970 Supp.) which is part of Indiana's Employment Security Act. Subsections 52-1542a(a) and (b) provide for a determination by the Indiana Security Employment Division of a claimant's status as an insured worker. Notice of the determination to both the claimant and the employer is provided for, and a hearing on such determination before a referee may be requested by either party. If no hearing is requested, the determination is final and benefits are paid or denied in accordance therewith. IND. ANN. STAT. § 52-1542a(a), (b) (Burns 1970 Supp.). Under § 52-1542a(c), an employing unit, including an employer, having knowledge of facts which may affect an individual's eligibility or right to waiting period credits or benefits shall notify the division of such facts.

The Indiana unemployment compensation scheme provides for the weekly determination, throughout the benefit period, by the deputy of the Division of a claimant's eligibility, the validity of his claims, and the attributability to the employer of the cause for which a claimant left his work. IND. ANN. STAT. § 52-1542a(d) (Burns 1970 Supp.). Under § 52-1542a(d), the deputy *may* refer the claim to a

referee who makes the initial determination with respect to the aforementioned matters in accordance with hearing procedure set forth in IND. ANN. STAT. § 52-1542b (Burns 1964 Repl.).

IND. ANN. STAT. § 52-1542a(e) (Burns 1970 Supp.), provides in pertinent part as follows:

> In cases where the claimant's benefit eligibility or disqualification is disputed, the division shall promply notify the claimant and the employer or employers directly involved or connected with the issue raised as to the validity of such claim, the eligibility of the claimant for waiting period credit or benefits, or the imposition of a disqualification period or penalty, or the denial thereof, and of any nonattributability to the employer of the cause for which the claimant left his work, of such determination and the reasons thereof. . . . [U]nless the claimant or such employer . . . asks a hearing before a referee thereon, such decision shall be final and benefits shall be paid or denied in accordance therewith . . . *In the event that a hearing is requested, the payment of any disputed benefits with respect to the period prior to the final determination or decision shall be made only after such determination or decision. Benefits with respect to any week not in dispute shall be paid promptly regardless of any appeal.* (Emphasis added).

Subsequent to the decision in *California Dep't of Human Resources Dev. v. Java*, 91 S.Ct. 1347 (1971), the court requested a stipulation of facts as to the plaintiff Hiatt which the parties filed on July 13, 1971. The facts of this case, insofar as they relate to plaintiff Hiatt, can be summarized as follows. Plaintiff Ronald M. Hiatt is an adult citizen of the United States and the State of Indiana and resides in New Haven, Indiana. On July 13, 1970, Hiatt applied and was declared eligible for unemployment compensation

benefits by the Fort Wayne Branch of the Indiana Employment Security Division. Hiatt's first unemployment compensation benefits were received on July 29, 1970, and subsequent to the declaration of eligibility, he received four checks, each in the amount of $49.00.

On August 21, 1970, Hiatt accepted part-time employment with the Indiana Janitor Service Company, Inc., as a result of which his weekly benefits for the week ending August 22, 1970 were reduced to $43.00. Prior to the filing of the complaint in this action, Hiatt received his last check in the amount of $43.00 for the week ending August 22, 1970. Hiatt was fired on September 1, 1970 from his job with the Indiana Janitor Service Company, Inc. for alleged misconduct on the job. The Fort Wayne Branch of the Indiana Employment Security Division was advised of the firing on September 2, 1970, and on September 3, 1970 Mr. O. W. Brown, a deputy of the Fort Wayne Branch, determined that Hiatt had been discharged not for misconduct but for dissatisfaction of the employer with the quality of Hiatt's work. Plaintiff thus continued to be eligible for benefits in the amount of $49.00 per week, subject to the employer's right of appeal under § 52-1542a and affirmance on appeal.

The Indiana Janitor Service Co., Inc. appealed the determination of Deputy Brown; consequently, Hiatt's weekly benefit check in the amount of $38.00 for the week ending August 29, 1970 was withheld by defendants. The parties further stipulated that Hiatt's benefits were suspended or withheld pursuant to IND. ANN. STAT. § 52-1542a(e) (Burns 1970 Supp.) and that § 52-1542a(e) does not provide for a hearing prior to suspension or termination of benefits, nor was plaintiff Hiatt afforded a hearing.

On October 29, 1970, a hearing was conducted pursuant to the employer's appeal, and on November 4, 1970, a

referee reversed Deputy Brown's determination. Plaintiff then appealed the referee's reversal, and after a hearing on December 3, 1970, the Review Board entered an order reversing the referee's decision. Hiatt was therefore eligible for all benefits withheld.

The parties further stipulated that defendants are required under § 52-1542a to withhold benefits immediately upon timely request by the employer challenging the defendants' determination of eligibility. Finally, the parties agree that there is a class of people in the State of Indiana who, like Hiatt, have had or will have their unemployment compensation benefits terminated, suspended, withheld, and reduced without a hearing solely because of the requirements of § 52-1542a(e).

The identical issue arises in this action with regard to plaintiff Hiatt which the Supreme Court recently confronted in *Java, supra*: whether a State may, consistent with § 303(a)(1) of the Social Security Act, 42 U.S.C. § 503 (a)(1), suspend or withhold unemployment compensation benefits from a claimant when an employer takes an appeal from an initial determination of eligibility. *Java, supra* at 1349. Following the decision in *Java*, the court concludes that IND. ANN. STAT. § 1542a(e) (Burns 1970 Supp.) conflicts with the requirements of § 303(a)(1) of the Social Security Act which provides in part as follows:

> The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—
>
> (1) Such methods of administration . . . as are found by the Secretary of Labor *to be reasonably calculated to insure full payment of unemployment compensation when due.* . . . (Emphasis added).

The California Unemployment Insurance Code, which was the subject of attack in *Java*, provided, after an eligibility interview and initial determination of eligibility, for automatic suspension of benefits upon an employer's appeal. *Java, supra* at 1352. Indiana's statute similarly suspends payment of benefits after a determination of eligibility upon an employer's appeal, and such a program is not "reasonably calculated to insure full payment of unemployment compensation when due." *Java, supra.* "When due," as used in § 303(a)(1) of the Social Security Act, was intended to mean "at the earliest stage of unemployment that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard." *Java, supra* at 1354.

> [T]he word "due" in § 303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment. Paying compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes. *Java, supra* at 1355.

The court finds that the critical point in the Indiana procedure is the initial determination of all employee's status as an insured worker and the deputy or referee's initial determination of eligibility. Under § 52-1542a(a), (b), a hearing may be requested by either party regarding defendants' determination of a claimant's status as an insured worker. Under § 52-1542a(d), a deputy makes the weekly determi-

nation of eligibility *unless* he refers to a referee who conducts a hearing. Although the State of Indiana has chosen not to require an interview or hearing on all claims before an interview or hearing on all claims before a determination is made, benefits are "due" when first administratively allowed under § 52-1542a(a), (b), (d). Plaintiff Hiatt was determined to be an insured employee and was found to be eligible, and at that point in the Indiana program, benefits became "due" under § 303(a)(1) of the Social Security Act. Under Indiana's program, the employer and the State are protected, in the event that an initial determination of eligibility is reversed on appeal after benefits have been paid, by IND. ANN. STAT. § 52-1537 (Burns 1964 Repl.), which in part provides for repayment of benefits by an employee and relief for the employer's experience account.

The court thus finds that IND. ANN. STAT. § 52-1542a(e), insofar as it provides for the nonpayment of any disputed benefits with respect to the period prior to the final determination or decision if a hearing is requested, is inconsistent with § 303(a)(1) of the Social Security Act. *Java, supra.*

As previously indicated, the court will also consider the supplemental motion with regard to the intervening plaintiff, Essie B. Burney, and the subclass which she seeks to represent. Based upon the stipulations of fact filed September 21, 1971 and September 29, 1971 and plaintiffs' Request for Admissions filed July 8, 1971 which must be considered as admitted since no timely response was filed, Essie B. Burney is an adult citizen of the United States and the State of Indiana and is a resident of Fort Wayne, Indiana. On January 7, 1971, she applied and was declared eligible for unemployment compensation insurance benefits by defendants, and she received her first benefits late in

January 1971. Her eligibility resulted from employment at the Holiday Inn which had been terminated on December 27, 1970. By notice dated March 26, 1971, plaintiff Burney was advised by a deputy that her benefits were suspended as of the week ending March 27, 1971 because she limited and restricted the hours for which she was available for work. Plaintiff Burney was thus held unavailable for work by the deputy pursuant to § 52-1542a(d) as of the week ending March 27, 1971 and until such time as she entered the labor market and became available for all shifts of work. The deputy's conclusion was based upon Mrs. Burney's failure to accept employment as a dishwasher from 5:00 p.m. to 2:00 a.m. because of transportation difficulties. The benefits were terminated without a prior hearing.

On August 11, 1971, plaintiff Burney moved for a preliminary injunction to prevent defendants from terminating, suspending, withholding, or reducing unemployment compensation benefits without a prior due process hearing. In their memorandum in support of the motion for a preliminary injunction, plaintiffs state that the facts concerning intervening plaintiff Burney and the subclass which, like her, had benefits terminated, withheld, or reduced because of an administrative determination of ineligibility require a constitutional decision based on *Goldberg v. Kelly*, 397 U.S. 254 (1970). On the other hand, plaintiffs contend that plaintiff Hiatt's factual situation presents a "when due" issue controlled by *Java, supra*. However, plaintiffs concede that

> [i]n the alternative, this court could decide that this aspect of the case [the intervening complaint of plaintiff Burney] is also controlled by *Java* and benefits are "due" after a determination of eligibility until such time as a due process hearing is

held and a decision issued finding the claimant no longer eligible.

Plaintiffs seek to establish two subclasses in their class action. First, plaintiff Hiatt allegedly represents a subclass having benefits suspended and withheld because of an employer's appeal after a determination of eligibility. Second, plaintiff Burney allegedly represents a subclass having benefits terminated, withheld, or reduced because of an administrative determination of ineligibility after an original determination of eligibility.

Both plaintiff Hiatt and plaintiff Burney represent a general class of people who have been or will be determined by defendants to be eligible for unemployment compensation benefits, and who have had or will have such benefits terminated, withheld, suspended, or reduced without a prior, due process hearing. The reason for such termination, withholding, or reduction of benefits, whether an appeal by the employer under § 2-1542a(e) or a subsequent weekly determination of ineligibility by a deputy under § 52-1542a(d), does not affect the basis of the court's findings under the facts here presented. Both plaintiffs Hiatt and Burney were determined to be eligible by defendants and were receiving benefits pursuant to Indiana's unemployment compensation program.

Even though defendants review on a weekly basis the eligibility of a claimant, the court finds that the concept of when benefits are due under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of ineligibility. The court thus finds that plaintiff Burney's benefits were "due" and could not be summarily suspended due to a deputy's determination of ineligibility under § 2-1542a (d). Having been found eligible pursuant to the procedures

set forth in § 52-1542a, plaintiff Burney was entitled to benefits until defendants afforded her a hearing. To conclude otherwise would frustrate the purpose of early substitute compensation during unemployment under § 303(a)(1) of the Social Security Act. *See Java, supra* at 1355.

The court makes no finding with regard to those claimants who are initially determined to be ineligible for unemployment compensation benefits without a prior hearing, since no plaintiff is now before the court who was initially determined to be ineligible.

The above holding, based on *Java,* makes it unnecessary to reach the constitutional issue involved in *Goldberg, supra,* and relied upon in *Crow v. California Dep't of Human Resources,* 325 F. Supp. 1314 (N.D.Cal. 1970). The motion for summary judgment is granted.

DECREE AND INJUNCTION

1. It is considered, ordered, adjudged, and declared that IND. ANN. STAT. § 1542a(e) (Burns 1970 Supp.), insofar as it provides that

> [i]n the event that a hearing is requested, the payment of any disputed benefits with respect to the period prior to the final determination or decision shall be made only after such determination or decision

is inconsistent with § 303(a)(1) of the Social Security Act and therefore invalid.

2. It is considered, ordered, adjudged, and declared that the practice of terminating, suspending, withholding, and reducing unemployment compensation benefits without a prior, due process hearing, after a claimant has been previously determined eligible, is inconsistent with § 303(a)(1) of the Social Security Act.

3. Accordingly, the defendants, their successors in office, their agents and employees are enjoined from terminating, withholding, suspending, and reducing the unemployment compensation benefits due plaintiff Hiatt and members of the class solely because of an employer's appeal following a determination of a claimant's eligibility for benefits, whether such determination of eligibility be made at the time of the initial application or pursuant to a decision on appeal, without providing a prior, due process hearing.

4. Further, the defendants, their successors in office, their agents and employees are enjoined from terminating, withholding, suspending and reducing the unemployment compensation benefits of plaintiff Burney and members of the class, who have been determined eligible and subsequently ineligible pursuant to an administrative decision, without a prior due process hearing.

Entered this 27th day of October, 1971.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

RONALD M. HIATT, ET AL., *Plaintiffs*, v. INDIANA EMPLOYMENT SECURITY DIVISION, ET AL., *Defendants.*	Civil No. 70 F 122

ORDER

On November 8, 1971, the defendants filed a motion with this court seeking an amendment to the decree and injunction heretofore entered by this court on October 27, 1971. On November 16, 1971, plaintiffs filed a memorandum opposing defendants' motion.

This court having considered defendants' motion of November 8, 1971 now denies defendants' motion to amend the decree and injunction of October 27, 1971.

Entered by authority of the entire panel this 29th day of November, 1971.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

RONALD M. HIATT, ET AL., *Plaintiffs,* v. INDIANA EMPLOYMENT SECURITY DIVISION, ET AL., *Defendants.*	Civil No. 70 F 122

NOTICE OF APPEAL

Notice is hereby given that the Indiana Employment Security Division and each of the defendants in this action hereby appeal to the United States Supreme Court from the Order of this Court of November 29, 1971, refusing to amend that court's decree of October 27, 1971, and from that portion of the court's Memorandum of Decision and Order of October 27, 1971, concerning intervening plaintiff Burney.

APPENDIX B

Indiana Code of 1971, 22-4-17-2

Sec. 2. (a) When an individual files an initial claim the Division shall promptly make a determination of his status as an insured worker, in a form prescribed by the board. A written notice of the determination of insured status shall be furnished him promptly. Each such determination shall be based on and include a written statement showing the amount of wages paid to him for insured work by each employer during his base period and shall include a finding as to whether such wages meet the requirements for him to be an insured worker, and, if so, the week ending date of the first week of his benefit period, his weekly benefit amount, and the maximum amount of benefits that may be paid to him for weeks of unemployment in his benefit period. For the individual who is not insured, the notice shall include the reason for the determination. Unless the individual, within ten (10) days after such determination was mailed to his last known address, or otherwise delivered to him, asks a hearing thereon before a referee, such determination shall be final and benefits shall be paid or denied in accordance therewith.

(b) The Division shall promptly furnish each employer in the base period whose experience or reimbursable account is potentially chargeable with benefits to be paid to such individual with a notice in writing of his benefit liability. Such notice shall contain the date, the name and social security account number of the individual, the ending date of his base period and the week ending date of the first week of his benefit period. Such notice shall further contain information as to the proportion of benefits chargeable to the employer's experience or reimbursable account in ratio to the earnings of such individual from such employer. Unless the employer within ten (10) days after

such notice of benefit liability was mailed to his last known address, or otherwise delivered to him, asks a hearing thereon before a referee, such determination shall be final and benefits paid shall be charged in accordance therewith.

(c) An employing unit, including an employer, having knowledge of any facts which may affect an individual's eligibility or right to waiting period credits or benefits, shall notify the Division of such facts promptly in accordance with regulations prescribed by the board.

(d) In addition to the foregoing determination of insured status by the Division, the deputy shall, throughout the benefit period determine the claimant's eligibility with respect to each week for which he claims waiting period credit or benefit rights, the validity of his claim therefor, and as the case may be the attributability to the employer of the cause for which the claimant left his work, or may refer such claim to a referee, who shall make the initial determination with respect thereto in accordance with the procedure in IC 1971, 22-4-17-3 hereof.

(e) In cases where the claimant's benefit eligibility or disqualification is disputed, the Division shall promptly notify the claimant and the employer or employers directly involved or connected with the issue raised as to the validity of such claim, the eligibility of the claimant for waiting period credit or benefits, or the imposition of a disqualification period or penalty, or the denial thereof, and of any nonattributability to the employer of the cause for which the claimant left his work, of such determination and the reasons thereof. Except as otherwise hereinafter provided in this Subsection regarding parties located in Alaska, Hawaii and Puerto Rico, unless the claimant or such employer within ten (10) days after such notification was mailed to his or its last known address, or otherwise delivered to him or it, asks a hearing before a referee thereon, such decision shall be final and benefits shall be

paid or denied in accordance therewith. With respect to notice of disputed administrative determination or decision mailed or otherwise delivered to the claimant or employer either of whom is located in Alaska, Hawaii or Puerto Rico, unless such claimant or employer within fifteen (15) days after such notification was mailed to his or its last known address or otherwise delivered to him or it, asks a hearing before a referee thereon, such decision shall be final and benefits shall be paid or denied in accordance therewith. If such hearing is denied the request therefor shall be filed with the board in writing within the prescribed periods as above set forth in this Subsection and shall be in such form as the board may prescribe. In the event that a hearing is requested, the payment of any disputed benefits with respect to the period prior to the final determination or decision shall be made only after such determination or decision. Benefits with respect to any week not in dispute shall be paid promptly regardless of any appeal.

(f) No person shall participate on behalf of the Division in any case in which he is an interested party.

(g) Solely on the ground of obvious administrative error appearing on the face of an original determination, and within the benefit year of the affected claims, the Director, or a representative authorized by the Director to act in his behalf, may reconsider and direct the deputy to revise the original determination so as to correct the obvious error appearing therein. Time for filing an appeal and requesting a hearing before a referee regarding the determinations handed down pursuant to this Subsection shall begin on the date following the date of revision of the original determination and shall be filed with the board in writing within the prescribed periods as above set forth in Subsection (c) of this Section.